

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. ST/89950/2014

(Arising out of Order-in-Original No. PUN-EXCUS-1-COM-018-14-15 dated 1.9.2014 passed by Commissioner of Central Excise, Pune-I)

Dilip Chhabria Design Pvt. Ltd.

Appellant

Vs.

Commissioner of Central Excise, Pune-I

Respondent

Appearance:

Shri R.D. Waglay, Advocate, for appellant

Shri R. Kapoor, Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 24.7.2018

Date of Decision: 24.7.2018

ORDER No. **A/87146/2018**

Per: Sanjiv Srivastava

Appellants are providing various taxable services namely Interior Decorator Services, Design Services, servicing of Motor Vehicle, and Management Consultancy Services. They are registered with Service Tax Registration No AAACD7823MST002. Acting on intelligence that they were not paying the service tax due on taxable services provided by them, their

premises was visited by the officers of anti evasion Pune 1 on 3.12.2012. It was observed that Appellants had not paid service tax from December 2011 onwards. Accordingly, a show cause notice dated 25.2.2014 was issued to them demanding service tax of Rs 1,93,17,035/- along with interest due on the same. Show Cause Notice also proposed penalty on the appellants under the provisions of Section 76, 77 & 78 of the Finance Act, 1994. In their reply appellant did not contested the demand but stated that due to financial hardship they had not paid the service tax due by the due date. However in ST-3 return filed by them they had shown the service tax payable but not paid. They contended that non payment of service tax was on account of financial difficulties and there was no intention to evade payment of taxes. Further they have paid Rs 24,76,250/- even prior to investigation being undertaken, and entire amount of service tax along with interest due had been paid by them prior to issuance of the show cause notice. Commissioner has after consideration of the submissions confirmed the demand of service tax along with interest due and have appropriated the amounts paid by them towards the demands confirmed. Commissioner has also imposed a penalty of Rs 96,58,517/- under the provisions of Section 78(1) of Finance Act, 1994. Since he had

imposed penalty under section 78(1) he did not imposed penalty under section 76. He also gave a option to pay penalty @ 25 % of the duty demanded i.e. Rs 48,29,259/- in terms of the third proviso to section 78(1) in lieu of penalty imposed if the same is paid within the prescribed time of thirty days. Aggrieved by the said order imposing the penalty appellant have filed this appeal.

2.0 Arguing in favour of Appeal, Shri R D Wagley Advocate submitted that they are:-

- i. Not contesting the demand of service tax and interest. They have already paid the said amount of service tax and interest;
- ii. They are in appeal against the penalty imposed, since they had no intention to evade payment of tax and they had declare the tax payable in the returns filed they have also not suppressed anything from the department. Accordingly no penalty should have been imposed upon them.
- iii. In support he relied upon decisions in following cases
 - a. CCE vs Adecco Flexions Workforce Solution Ltd. [2012 (26) STR 3 (KAR)]
 - b. CCE vs Galaxy Construction Pvt Ltd [2017 (48) STR 37 (BOM)]

c. C Ramchandran vs CST {2016 (46) STR 866
(T-Chennai)]

d. CEA-Raj Construction vs CCE [Order No
A/86655/17/STB dated 15.03.2017]

3.0 Arguing for the revenue Shri Roopam Kapoor Commissioner, Authorized Representative supported the order of Commissioner and submitted that since the Appellants have not paid the service tax due on time, the penalty under section 78(1) is completely justified. He further pointed to para 18.2 of the order in original, wherein specific finding has been recorded that during the period December 2011 to March 2013, appellants had actually charged and collected the service tax from their customers but had not deposited the same. Since they have collected the tax from their customers their intention to evade payment of tax is quite evident and penalty on them justified.

4.0 We have considered the submissions made.

5.0 In the present case Appellant is not disputing the demand of Service Tax and consequential interest on account of delay in payment of tax. He is only disputing the penalty imposed. From the facts of the case it is quite evident that Appellant was aware of his

responsibility for payment of service tax. In fact he was collecting the same from his clients, (service recipients). However instead of depositing the same he was keeping the same with himself on the pretext that he was going through financial hardships.

6.0 Hon'ble Supreme Court has held in case of:

- i. Madhumilan Syntex Ltd. Vs Union of India [2007 (210) ELT 484 (SC)] that *"We are unable to agree with the above view of the High Court. Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and an appropriate action can be taken under the Act. Interpretation canvassed by the learned counsel would make the provision relating to prosecution nugatory."*
- ii. M/s Gujarat Travancore Agency, Cochin Vs Commissioner Income Tax [1989 (42) ELT 350 (SC)] that *"..... unless there is something in the language of statute indicating the need to establish the element of mensrea it is generally sufficient to prove that default in complying with the statute has occurred, In our view there is nothing in Section 271(1)(a) of the IT Act which*

requires that mensrea must be proved before penalty can be levied under that provision.”

- iii. Union of India Vs M/s Dharmendra Textile Processors [2008-TIOL-192-SC-LB] that “It is delinquency of the defaulter itself which establishes his blameworthy conduct Without any further proof of existence of mensrea.”
- iv. M/s Rajasthan Spinning and Weaving Mills {2009 (238) ELT (SC) that “.....*We completely fail to see how payment of differential duty, whether before or after the show cause notice is issued can alter the liability for penalty, the conditions for which are clearly spelt out in Section 11AC of the Act.*”

7.0 During the course of arguments counsel for Appellant had referred to certain decisions in his support. However said cases are clearly distinguishable, as in none of the said cases it has been shown that the delay in payment of tax was done knowingly and for purpose of the gain. In the present case when the appellant was aware of his responsibility to pay the tax as he was collecting the same from his customers clients. Further he was aware of his liabilities in the law as he was filing his returns indicating the tax liability. Since he was aware of his liabilities and was willfully not depositing the tax collected his conduct is not of

simple ignorance but of will default to hold the tax money for personal gains. In such a situation the conduct of Appellant cannot be justified and penalty as imposed by the commissioner needs to be upheld.

8.0 Appeal filed is without merits hence dismissed.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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